Hastings Law Journal

Volume 35 | Issue 5 Article 6

1-1984

Curbing Injurious PAC Support through 2 U.S.C. 441d

Mitchell L. Gaynor

Note

Curbing Injurious PAC Support Through 2 U.S.C. § 441d

Senatorial candidate John Goodman and his advisors huddle around a television to watch the broadcast of a controversial commercial endorsing his candidacy. "Did you know George Enright was disciplined for cheating at State University?" inquires the narrator as the screen depicts a student staring brazenly onto his classmate's examination paper. The scene shifts to show an adult stumbling into his car while the narrator continues, "Did you know George Enright was charged with drunk driving? Our state cannot afford to have a senator of Enright's character; vote for John Goodman, a man of proven character." A picture of Goodman appears on the screen, and the commercial fades out.

Goodman and his campaign advisors are furious. The repeated telecasts of the commercial are causing a backlash of public opinion against Goodman. Support for his election is declining steadily, but Goodman is unable to halt the broadcasts of the commercial. The negative commercial campaign against Enright is financed and produced by a fully independent political action committee (PAC)[1] over which Goodman has no control. Nonetheless, the public reacts against Goodman who they assume controls or encourages the dissemination of commercials that advocate his election and his opponent's defeat.

The scenario depicts how a candidate's campaign can be harmed when an independent political organization attempts to help the candidate. Although the Goodman-Enright campaign is fictional, such injurious PAC support occurred during the 1982 Maryland senatorial campaign. Candidate Lawrence Hogan's campaign was seriously undermined by a negative PAC advertising campaign directed against his

1. The term political action committee (PAC) commonly refers to political organizations created for the purpose of making campaign contributions or expenditures. A PAC is legally defined as any committee, club, association, or other group of persons which receives aggregate contributions exceeding $1000 per year or makes expenditures in excess of $1000 per year; or any separate segregated fund covered by 2 U.S.C. § 441b(b); or certain local committees of a political party. 2 U.S.C. § 431(4) (1982).

opponent, Senator Paul Sarbanes.[2] This Note will refer to such election assistance that backfires because the voters misperceive the source of the communication as "injurious PAC support."

The problem of injurious PAC support has not been addressed by legal commentators.[3] Politicians who must conduct election campaigns, however, have considered the potential dangers of injurious PAC support. In 1976 Congress enacted 2 U.S.C. § 441d,[4] apparently in an attempt to reduce the danger of injurious PAC support. This statute, governing the distribution of political statements, imposed identification requirements on political statements concerning candidates. These requirements enable the recipients of political communications to distinguish communications authorized and paid for by a candidate from those statements independently produced and distributed by political action committees.

This Note first examines the reasons for the rapid development of PACs within the last fifteen years. The Note then considers the legislative solution to the problem of injurious PAC support embodied in 2 U.S.C. § 441d, and focuses on its requirement that political communications include attribution and authorization statements. By compelling the disclosure of specific information related to political statements, however, section 441d implicates the first amendment. This Note analyzes the first amendment issues and concludes that the law is constitutional. Finally, the Note considers the desirability and effectiveness of section 441d as a means of eliminating injurious PAC support.

---

2. *See infra* notes 31-33 & accompanying text.

3. Commentators have focused on other aspects of PACs. *See, e.g.*, Adamany, *PACs and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569 (1980) (focusing on the effects of PACs on campaign financing); Elliott, *Political Action Committees—Precincts of the '80's*, 22 ARIZ. L. REV. 539 (1980) (refuting the public's popular misconceptions about PACs); Mayton, *Politics, Money, Coercion, and the Problem with Corporate PACs*, 29 EMORY L.J. 375 (1980) (exploring the growth of corporate PACs); Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Contributions and Expenditures*, 65 CORNELL L. REV. 945 (1980) (examining the constitutionality of the restrictions on corporate and union participation in the political process codified in the Federal Election Campaign Act of 1971); Sorauf, *Political Parties and Political Action Committees: Two Life Cycles*, 22 ARIZ. L. REV. 445 (1980) (discussing the impact of PACs on political parties); Vandegrift, *The Corporate Political Action Committee*, 55 N.Y.U. L. REV. 422 (1980) (suggesting major revisions in the statutory scheme regulating PACs so that regulation of corporate and individual contributions would be harmonious); Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV. 603 (1980) (concentrating on PACs' influence on the political process).

4. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 323, 90 Stat. 475, 493 (codified at 2 U.S.C. § 441d (1976) (amended 1980)).

Background

The rapid growth of PACs is linked to the development of campaign funding reforms in the late 1970s. During the early 1970s, political action committees were relatively rare.[5] Post-Watergate revelations of campaign abuses led Congress to enact a variety of election reforms in 1974 as amendments to the Federal Election Campaign Act (FECA).[6] An examination of these reforms and their subsequent judicial interpretation elucidates the rapid growth of PACs.

The FECA amendments limited contributions to[7] and expenditures on behalf of[8] a particular candidate, placing a $1,000 ceiling on individuals and a $5,000 ceiling on political committees.[9] The Act also required candidates to disclose the sources of their contributions.[10] Finally, the Act created the Federal Election Commission to monitor federal elections.[11]

These provisions do not directly promote PACs. When the Supreme Court modified FECA in *Buckley v. Valeo*,[12] however, it created a mechanism by which campaign contributors could circumvent FECA's requirements through the use of PACs. In *Buckley*, the Supreme Court addressed the constitutionality of campaign spending and contribution limits.[13] Reasoning that political spending, unlike political contributions, constituted speech deserving full constitutional protection,[14] the Court held that imposing a limit on the amount an individual could spend on behalf of a candidate was an impermissible infringement on first amendment rights.[15]

The Court sustained the limit on contributions on the ground that the state has a compelling interest in curtailing the actual or apparent

5. In 1972 there were only 113 PACs, Isaacson, *Running With the PACs*, TIME, Oct. 25, 1982, at 22, most of which were organized by labor unions. *Id.* For a more recent estimate of the number of PACs in existence, see *infra* note 22 & accompanying text.

6. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 18 U.S.C.).

7. 18 U.S.C. § 608(b)(1) (Supp. IV 1974) (current version at 2 U.S.C. § 441a(1)(A) (1982)).

8. 18 U.S.C. § 608(e)(1) (Supp. IV 1974) (repealed 1976).

9. 18 U.S.C. § 608(b)(2) (Supp. IV 1974) (current version at 2 U.S.C. § 441a (1)(C) (1982)).

10. 2 U.S.C. §§ 431-437 (Supp. IV 1974) (amended 1980).

11. 2 U.S.C. § 437c (1976) (amended 1980).

12. 424 U.S. 1 (1976).

13. *Id.* at 29, 35.

14. *Id.* at 19-21.

15. *Id.* at 54-57.

corruption that results from large financial contributions.[16] The Court, however, did not find a compelling governmental interest in limiting an individual's political expenditures because it considered expenditures less likely to lead to corruption.[17] The Court concluded that because such expenditures must be made independently of the candidate, they were less likely to be "given as a quid pro quo for improper commitments from the candidate."[18] Moreover, independent expenditures may "provide little assistance to the candidate's campaign and indeed may prove counterproductive."[19] Thus, expenditures on behalf of the candidate were constitutionally protected from limitations.[20]

Consequently, under the rule of *Buckley* an individual may spend unlimited amounts advocating the election of a candidate, but may contribute only $1,000 directly to the candidate or to the candidate's campaign committee. Individuals can circumvent the $1,000 limit, however, by contributing unlimited funds to a PAC, which then can contribute up to $5,000 to a candidate or independently spend an unlimited amount to advocate the candidate's election or defeat.[21]

The growth of PACs since *Buckley* has been phenomenal. By 1982, the number of PACs had soared to 3,149.[22] PAC contributions and expenditures for 1982 were estimated at $240 million.[23] Although the vast majority of PACs are associated with corporations, labor unions, or professional and trade associations,[24] a number of PACs advocate certain ideals rather than the interests of any particular organization, and support candidates professing similar beliefs.[25]

16. *Id.* at 26-27.
17. *Id.* at 45-47.
18. *Id.* at 47.
19. *Id.*
20. *Id.* at 51.
21. The expenditure limit struck down by the *Buckley* court on first amendment grounds applied to individuals, groups, political committees, corporations, and associations. *Buckley*, 424 U.S. at 23. Therefore, a PAC, like an individual, may make unlimited expenditures. A multicandidate political committee, however, is limited to making direct contributions to a candidate not in excess of $5,000. 2 U.S.C. § 441a(2)(A) (1982).
22. Isaacson, *supra* note 5, at 20. Commentators advance varying estimates of the number of PACs existing in 1982. *See, e.g.*, Sanoff, *PAC Spells More Than a Game in Politics*, U.S. NEWS AND WORLD REP., Oct. 25, 1982, at 37 (more than 3,200); San Francisco Chron., Feb. 23, 1983, at F5, col. 1 (3,371 PACs).
23. Isaacson, *supra* note 5, at 20.
24. The 1980 FEC report categorizes PACs as labor, corporate, trade/membership/health, and non-connected. *See* 1980 F.E.C. ANN. REP. 29 (1980). In 1980, non-connected PACs numbered fewer than 500 out of 2,500 total PACs. *Id.*
25. Ideological PACs are characterized by the lack of an affiliation with an institution, such as a labor union or a corporation, and by adherence to a viewpoint within the liberal-conservative spectrum. Sorauf, *supra* note 3, at 453 n.42. The non-connected category of

These non-connected PACs may pose a greater threat to the integrity of the electoral process than the other categories of PACs because they frequently use campaign ads that attack the opponent.[26] In 1980 negative campaign expenditures constituted fourteen percent of the total money spent in all federal elections and seventy-eight percent of the independent money spent in Senate races.[27] Some commentators believe that because they are organized independently of other social institutions, the non-connected PACs are less accountable for the tone and content of their campaigns than are candidates or political parties.[28] Terry Dolan, chairman of NCPAC, commented that "[a] group like ours could lie through its teeth and the candidate it helps stays clean."[29]

Campaign tactics used by non-connected PACs, however, can actually injure the candidate endorsed by the PAC.[30] For example, in the 1982 Maryland senatorial campaign, Republican Lawrence Hogan challenged incumbent Maryland Democratic Senator Paul Sarbanes. In an attempt to defeat Sarbanes and to elect Hogan, NCPAC waged a $650,000 negative campaign against Sarbanes.[31] Sarbanes called attention to NCPAC's mud-slinging campaign tactics in order to turn public

PACs includes ideological PACs. *Id.* at 453 n.43. For example, the National Conservative Political Action Committee (NCPAC) is a large, independent, ideological PAC that is unaffiliated with a particular party or candidate and is dedicated to electing conservative candidates and defeating liberals. NCPAC achieved national recognition by targeting a number of liberal Senators for defeat in the 1980 elections and then contributing substantially to the defeat of four of them. Goldman & Fineman, *The War of the Wolf-PAC's*, NEWSWEEK, June 1, 1981, at 38; Isaacson, *supra* note 5, at 21; Sanoff, *supra* note 22, at 37.

26. For example, NCPAC discussed plans to launch a two million dollar negative campaign against Democratic Candidate Walter Mondale in 1984. C.B.S. Evening News, Feb. 15, 1984; San Francisco Chron., Feb 16, 1984, at 12, col. 1.

27. San Francisco Examiner, Nov. 29, 1981, at A9, col. 1; FEDERAL ELECTION COMMISSION, 1981 ANNUAL REPORT 11-12.

28. Goldman & Fineman, *supra* note 25, at 41; Isaacson, *supra* note 5, at 22.

29. Goldman & Fineman, *supra* note 25, at 41; Isaacson, *supra* note 5, at 22.

30. "[R]elentless pressure by the PACs can cause a backlash against their own candidates." Stone, *Have Calumny, Will Travel*, NATION, Oct. 10, 1981, at 346. Senator Charles Grassley stated shortly after the 1980 elections that NCPAC's support "had a somewhat negative impact" on his campaign because of the "flamboyant" and "negative" campaign it had conducted against his opponent. *Id.* at 345. In preparation for the 1982 elections, the Massachusetts' Republican leadership urged NCPAC to forego a negative campaign against Democratic Senator Ted Kennedy for fear that the attack would only add to his support. *See* Goldman & Fineman, *supra* note 25, at 38. PACs can also injure the candidate's campaign by focusing on polarizing issues that the candidate might prefer to de-emphasize in the interest of coalition building. Stone, *supra*, at 346. Consequently, PAC expenditures may well disrupt the efforts of the candidate and his staff to direct the campaign in a manner calculated to elect the candidate. The Supreme Court recognized this possibility in Buckley v. Valeo, 424 U.S. 1, 47 (1976).

31. *Attack Pac*, TIME, Oct. 25, 1982, at 26.

opinion against Hogan. Sarbanes' tactic proved successful and frustrated Hogan's campaign. In an attempt to distance himself from NCPAC, Hogan proclaimed during a television debate, "I hereby denounce NCPAC."[32] *Time Magazine* concluded that NCPAC's guns had backfired.[33]

The Injury From Independent PAC Campaigns

PACs can advance the cause of a candidate's election by offering contributions and making unlimited expenditures on the candidate's behalf. PAC support can backfire, however, and actually harm a candidate's campaign. The harm usually takes the form of voter disaffection due to public misperception concerning the candidate's responsibility for controversial campaign communications. This harm is especially egregious if the candidate has neither solicited nor authorized the PAC's efforts. In this section the Note considers PAC independence and voter misperception as two components of the injurious PAC support.

PAC Independence

Buckley held that an expenditure is protected from monetary limitations only if it is made independently of the candidate and her campaign.[34] Pre-arrangement or coordination between the PAC and the candidate or her agents would convert an expenditure into a contribution.[35] Consequently, PAC commercials or literature will qualify as independent expenditures only if they are designed, produced, and disseminated without the candidate's consent or involvement.[36] Thus, the candidate can have no voice in the expenditures initiated by PACs.

A candidate may be partly responsible for the injury resulting from PAC support if she has endorsed the PAC's actions.[37] A candidate who lacks control over the PAC, however, cannot be deemed mor-

32. *Id.*

33. *Id.*

34. 424 U.S. at 5.

35. *Id.* at 46-47. In a footnote in *Buckley*, the Court specifically stated that expenditures made with the consent of the candidate or her agents are contributions. *Id.* at 46 n.53.

36. The statute requires that independent expenditures be made without the candidate's, or his agents', request, suggestion, cooperation, or consultation. 2 U.S.C. § 431(17) (1982). It logically follows that if the candidate becomes involved in the expenditure to the point that it constitutes a contribution, then the candidate is responsible for the consequences of the political communications just as the candidate would be responsible for accepting a contribution.

37. *See infra* note 41 & accompanying text.

ally or legally responsible for any harm resulting to her campaign. Because it fosters the growth of independent PACs, the *Buckley* decision facilitates campaign expenditures over which the candidate has little control, but it does not indicate how the candidate should be protected from any adverse effects of the independent expenditures.

Moreover, because independent PAC expenditures are free from monetary limitations,[38] such expenditures may constitute a significant source of communications endorsing a candidate. The potential for independent communications increases the likelihood that the public will erroneously attribute PAC communications to the candidate.

Voter Misperception

Despite the PAC's independence from the candidate, the public is likely to believe that the candidate does play a role in the PAC communications endorsing her campaign. If the public mistakenly believes that the candidate and PAC are linked, any public reaction against the PAC will in turn be directed against the candidate. Thus, regardless of the candidate's actual involvement with a PAC's expenditures, public belief in her responsibility for the PAC campaign may well harm the candidate. For example, in the Sarbanes-Hogan campaign, Hogan was injured by Sarbanes' attempts to link NCPAC with Hogan.[39]

A false perception of a connection between the candidate and the supportive PAC can arise from a variety of sources. First and foremost, the perception arises from the commonality of interest between the candidate and the organization. Both want the candidate elected and her opponent defeated. Because the PAC is endorsing the candidate, the voters assume that the PAC and the candidate are working together. Moreover, the average voter may be unaware of the *Buckley* requirement for the independence of PAC expenditures.

The inference that a candidate has approved a commercial supporting her campaign may be strengthened by the use of the candidate's name within the name of the PAC organization. For example, one of the largest PACs in 1980 was the "1980 Republican Presidential Campaign Committee for Ronald Reagan."[40] The name implies a direct connection with the candidate. Moreover, the PAC's name may be so similar to that of the candidate's official campaign committee that

38. *See supra* note 21 & accompanying text.

39. *See supra* notes 31-33 & accompanying text.

40. The 1980 Republican Presidential Campaign Committee for Reagan spent approximately $314,690 in 1980, making it the ninth biggest spending PAC for that year. Stone, *supra* note 30, at 345.

the public, although aware that there are two separate organizations, becomes confused about which organization is authorized by the candidate. In the previous example, the name of the PAC is similar to that of Reagan's designated campaign organization, the "Reagan for President Committee."

Finally, a general skepticism toward politics might lead people to disbelieve the apparent independence of the decision-making of a supportive PAC from the candidate. Such skepticism is justified if the candidate does act in concert with the PAC. If there is actual cooperation or collusion between PAC and candidate, the voters will not withdraw support or votes based upon a misperception of responsibility, but upon a correct assessment of the relationship between the supportive PAC and the candidate. Injurious PAC support results only when the voters falsely blame the candidate for the independent actions of a supportive PAC or falsely impute to the candidate the political statements of a PAC.[41] The *Buckley* court, by removing monetary limitations on independent expenditures, facilitated PAC activities and greatly increased the risk of injurious PAC support.

A Legislative Solution: Section 441d

The tremendous implications of the *Buckley* decision brought about an immediate response from Congress. In 1976 it enacted a variety of election reforms deemed "necessary and desirable in light of the Supreme Court decision in the case of *Buckley v. Valeo*."[42] One of these new laws, 2 U.S.C. § 441d,[43] directly reduced the danger of injurious PAC support.

Section 441d, which governs the distribution of political statements,[44] effectuates a combination of identification requirements to eliminate the false impression of PAC-candidate interaction that is the primary cause of injurious PAC support. The law requires political

41. A supportive PAC ad or commercial could disrupt the candidate's campaign strategy by emphasizing former statements or viewpoints which are unpopular or which the candidate no longer holds. If the PAC statements about the candidate are accurate, there is no unjust injury; the public becomes more informed about the candidate's views, and the candidate is held responsible for her prior statements. Injurious PAC support, however, is the unjust injury caused by public misperception of the candidate's responsibility for the statements or actions of the independent PAC.

42. 1976 U.S. CODE CONG. & AD. NEWS 930.

43. 2 U.S.C. § 441d (1976) (amended 1980).

44. The statute applies to statements made through "any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general or public advertising." 2 U.S.C. § 441d(a) (1982).

communications to contain two types of clauses that enable the public to distinguish a statement made by the candidate from one made by an independent organization. The statute requires an attribution clause identifying the party paying for the communication and an authorization clause indicating whether the candidate has authorized the communication.[45] Although section 441d does minimize the risk of injurious PAC support, recent amendments to the statute have substantially weakened its effectiveness.

Section 441d, as adopted in 1976, divided communications into two categories: authorized and unauthorized. Communications authorized by a candidate or her agents were required "clearly and conspicuously, in accordance with regulations prescribed by the [Federal Election] Commission, [to] state that the communication has been authorized."[46] Communications not authorized by a candidate or her agents were required "clearly and conspicuously, in accordance with regulations prescribed by the Commission, [to] state that the communication has not been authorized by a candidate,"[47] and to state who made or financed the communication.[48] If the party financing the unauthorized communication was a PAC, the statute mandated disclosure of certain affiliated organizations.[49]

These requirements compelled both candidates and PACs to accept public responsibility for their communications. PACs not only had to identify themselves and their affiliates as the parties financing the communication, but they also had to state whether the candidate authorized their actions. Congress' decision to require these identification clauses can be interpreted as an attempt to eliminate potential public misconception as to various parties' responsibility for political statements.

In 1980, however, Congress sharply curtailed the force of section 441d.[50] Although Congress expanded the two categories of communi-

45. *See generally* 2 U.S.C. § 441d (1982). This Note defines the attribution clause as the requirement that the communication state who paid for it. The authorization clause is the section of the statute requiring the communication to state whether it is authorized or unauthorized.

46. 2 U.S.C. § 441d(1) (1976) (amended 1980).

47. *Id.* § 441d(2).

48. *Id.*

49. *Id.* In the case of statements made by political committees, the section required such statements to include the name of any affiliated or connected organization required to be disclosed under 2 U.S.C. § 433(b)(2) (1982).

50. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, title I, §§ 105(5), 111, 93 Stat. 1354, 1365 (1980).

cations to three,[51] it removed the requirement that statements comply with Commission regulations[52] and, more importantly, it deleted the word "conspicuous" from the statute.[53] If the communications are authorized and paid for by the candidate, the candidate need not state that the communication was authorized.[54] The attribution clause, however, was retained for the other categories of expenditures.[55] Congress also eliminated the requirement that unauthorized communications identify affiliated organizations.[56]

These changes weakened the force of the statute. Under the amended statute, the identification clauses need only be stated "clearly" as opposed to "clearly and conspicuously in accordance with Commission regulations."[57] The 1976 requirement that PACs clearly identify affiliated groups ensured that the public could distinguish a PAC from a candidate and could discern the character and identity of the PAC. Under the amended statute, a PAC need only state its name.[58] Without additional identifying information, the name of a PAC could easily be confused with the name of an authorized political organization.[59]

The 1976 requirement that the candidate state whether she had authorized the communication[60] compelled the candidate to accept personal responsibility for her political statements. The 1980 amendments removed this authorization requirement. This authorization disclosure clarified for the public whether the candidate or an independent organization was the source of a communication. Now the candidate need only state the financial sponsor of the communication.[61] Because the authorized communication is normally paid for by the candidate's designated committee rather than by the candidate herself, only the committee name will appear.[62] As noted previously, the names of the campaign committee and that of the PAC may be similar,

51. These categories are: (1) communications paid for and authorized by the candidate, (2) communications paid for by others but authorized by the candidate, and (3) communications not authorized by the candidate. 2 U.S.C. § 441d(a) (1982).

52. *Id.*

53. *Id.*

54. *Id.* § 441d(a)(1).

55. *Id.* § 441d.

56. *Id.* § 441d(a)(3).

57. *Compare* 2 U.S.C. § 441d(1), (2) (1976) *with* 2 U.S.C. § 441d (1982).

58. *Compare* 2 U.S.C. § 441d(2) (1976) *with* 2 U.S.C. § 441d (1982).

59. *See supra* note 40 & accompanying text.

60. 2 U.S.C. § 441d(1) (1976) (amended 1980).

61. 2 U.S.C. § 441d(a)(1) (1982).

62. *Id.*

causing confusion about who is the source of the campaign communication. A statement that the candidate has authorized the communication, however, lets the public know whether the candidate should be held responsible for controversial campaign communications.

Notwithstanding the 1980 amendments, section 441d still reduces the danger of injurious PAC support by requiring public disclosure of the actual relationship between PACs and candidates. Section 441d thus helps eliminate the inference that candidates and supportive PACs are linked.

The Constitutionality of Section 441d

Section 441d mitigates the danger of injurious PAC support by compelling individuals and organizations to state the source of political statements. By requiring disclosure of this information, however, the law raises constitutional questions concerning freedom of speech, privacy, and association.

The constitutionality of the unamended section 441d was raised in *Federal Election Commission v. Central Long Island Tax Reform.*[63] The defendant was charged with violating section 441d by distributing a pamphlet describing the voting record of a politician without identifying the pamphlet's author or distributor.[64] The trial court submitted the matter to the Second Circuit Court of Appeals for an en banc ruling on the constitutionality of the statutes at issue.[65] The court, however, resolved the issue on non-constitutional grounds.[66] The majority left open the question of constitutionality,[67] although the two concurring justices expressed doubts about the statute's validity.[68]

This Note will analyze the constitutionality of section 441d by comparing the statute with similar statutes whose constitutionality has been upheld by the courts. Because the original and amended versions contain similar clauses, their constitutionality will be jointly assessed. The attribution and authorization clauses, however, will be considered separately because they present different analytical problems.

63. 616 F.2d 45 (2d Cir. 1980).

64. *Id.* at 48-51.

65. *Id.* at 47.

66. *Id.* at 52. Additionally, the court indicated that, even if § 441d was unconstitutional, the literature at issue did not fall within the scope of the statute because it did not expressly advocate the election or defeat of the candidate. *Id.* at 52-53.

67. *Id.* at 51.

68. *Id.* at 54 (Kaufman, C.J., concurring).

The Attribution Clause: Facial Validity

The attribution clause in the amended section 441d requires that a communication advocating the election or defeat of a candidate identify the party paying for the communication.[69] The constitutionality of this clause can be assessed by examining the holding in *Talley v. California*[70] and succeeding cases.[71]

In *Talley* the United States Supreme Court struck down an attribution requirement because the Court found that it violated the first amendment. At issue was a city ordinance requiring all handbills to bear the names and addresses of the individuals who prepared or distributed them.[72] The Court noted that "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."[73] The Court, relying on two prior cases holding that under certain circumstances states may not compel public identification of individuals or groups engaged in the dissemination of ideas,[74] found the ordinance to be unconstitutional on its face.[75]

The rationale for the *Talley* holding, as well as the prior decisions, was that public identification could result in fear of reprisal from disgruntled individuals. If this fear deters individuals from engaging in peaceful discussions of important public matters, their first amendment rights are infringed.[76] The *Talley* majority recognized the importance of protecting the right to criticize oppressive practices and laws while preserving the speaker's anonymity.[77]

The Court, however, left open the question whether a more limited ordinance would be constitutional.[78] For this reason, *Talley* should

69. 2 U.S.C. § 441d(a)(1)-(3) (1982).

70. 362 U.S. 60 (1960).

71. *See* First Nat'l Bank v. Bellotti, 453 U.S. 765 (1978); United States v. Insco, 365 F. Supp. 1308 (M.D. Fla. 1973) *rev'd on other grounds*, 496 F.2d 204 (5th Cir. 1974); United States v. Scott, 195 F. Supp. 440 (D. N.D. 1961).

72. *Talley*, 362 U.S. at 60-61.

73. *Id.* at 64.

74. *Id.* (citing Bates v. City of Little Rock, 361 U.S. 516 (1960) (disclosure of NAACP membership lists); NAACP v. Alabama, 357 U.S. 449 (1958) (court order to produce NAACP records and membership lists)).

75. *Talley*, 362 U.S. at 65.

76. *Id.*; *Bates*, 361 U.S. at 523-24; *NAACP v. Alabama*, 357 U.S. at 462-63.

77. *Talley*, 362 U.S. at 64.

78. *Id.* The concurring and dissenting justices stated that despite such an infringement, the law could be sustained if a compelling governmental interest is demonstrated. *Id.* at 66 (Harlan, J., concurring); *id.* at 67 (Clark, J., dissenting). The dissenters argued that the ordinance sought to prevent fraud, deceit, false advertising, libel, and obscenity, and that these objectives were compelling. *Id.* at 69-70 (Clark, J. dissenting). The majority found the ordi-

be narrowly read as invalidating only overly broad attribution requirements.

The *Talley* decision reflects the view that precision of regulation is the touchstone of first amendment jurisprudence.[79] Attribution clauses that are narrower in scope than the one at issue in *Talley* have withstood constitutional attack. *United States v. Harriss*[80] involved a federal statute that required individuals engaged in lobbying to disclose their identities and information concerning the source and distribution of money.[81] The Supreme Court upheld the statute despite a challenge on first amendment grounds. The Court found a compelling governmental interest in ensuring that elected representatives may properly evaluate the source of political pressure.[82]

The strong governmental interest in protecting the integrity of the democratic system recognized in *Harriss* should also justify election attribution disclosure requirements such as the one contained in section 441d.[83] In fact, two lower court opinions[84] upheld the validity of the political attribution requirement contained in the predecessor to section 441d, 18 U.S.C. § 612.[85] Section 612, applicable to federal candidates, was far more limited in scope than the ordinance in *Talley*, which en-

nance unconstitutionally overbroad because it affected "any handbill in any place under any circumstance," *id.* at 63, and because no showing had been made that the ordinance was limited or directed to fraudulent, false, or deceitful communications. *Id.* at 64. The Court noted the absence of any legislative history indicating that the law's purpose was to identify the makers of false advertising or libelous statements. *Id.*

79. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 658 (1981) (Brennan, J., concurring); Schad v. Borough of Mt. Ephrain, 452 U.S. 61, 70 (1981); Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972).

80. 347 U.S. 612 (1954).

81. Federal Regulation of Lobbying Act, ch. 753, § 308, 60 Stat. 841 (1946) (codified at 2 U.S.C. § 267 (1982)). This statute requires disclosure of the names and addresses of lobbyists and their employers, as well as the destination, source, and amounts of monies expended.

82. *Harriss*, 347 U.S. at 625. Otherwise, the Court concluded, "the voice of the people may all too easily be drowned out by the voice of special interest groups . . . masquerading as proponents of the public weal." *Id.*

83. As Justice Clark commented in his dissent in *Talley*, "no civil right has greater claim to constitutional protection or calls for more rigorous safeguarding than voting rights." 362 U.S. at 70 (Clark, J., dissenting).

84. United States v. Insco, 365 F. Supp. 1308 (M.D. Fla. 1973), *rev'd on other grounds*, 496 F.2d 204 (5th Cir. 1974); United States v. Scott, 195 F. Supp. 440 (D. N.D. 1961).

85. Act of June 25, 1948, ch. 645, 62 Stat. 724, *amended by* Act of Aug. 25, 1950, ch. 784, § 2, 64 Stat. 475) (codified at 18 U.S.C. § 612) (repealed 1976). This law made it a crime for any person willfully to mail or to transport in interstate commerce written materials concerning any publicly declared candidate for specified federal offices if the materials did not contain the names of the individuals or organizations responsible for distributing the communication.

compassed all handbills regardless of subject matter. An analysis of these holdings indicates that a court determining the constitutionality of section 441d would be inclined to follow these cases rather than *Talley*.

In *United States v. Scott*[86] the defendant was charged with violating section 612 by distributing election pamphlets that did not bear the names of persons responsible for the distribution and publication.[87] Scott challenged the statute on the ground that it violated the first amendment under the holding in *Talley*.[88] The district court rejected this constitutional challenge because the statute only compelled disclosure of the identity of pamphlet writers and distributors in certain specified instances.[89] The court found that the underlying purpose of the attribution clause was to inform the electorate and to assist them in determining why a candidate was being supported or opposed by an individual or group.[90] The law enabled voters to cast their ballots intelligently,[91] and it eliminated the danger of the circulation of surreptitious literature concerning candidates[92] by requiring the disclosure of the authors' or distributors' names. The court found no evidence that section 612 subjected individuals to fear of reprisal or harassment.[93] The mere allegation of a possibility of reprisal was deemed insufficient to render the law unconstitutional.[94] Moreover, the court concluded that the great value of the law far outweighed the supposed infringement of the defendant's rights.[95]

The constitutionality of section 612 was again challenged in *United States v. Insco*.[96] Insco, a congressional candidate running against Gunter, had manufactured and distributed bumper-stickers reading "McGovern-Gunter." The stickers did not state that Insco had paid for them. They were apparently designed to convince the public that they had been published by Gunter.[97] Insco argued that *Talley*

86. 195 F. Supp. 440 (D. N.D. 1961).
87. *Id.* at 441.
88. *Id.* at 442.
89. *Id.* at 443.
90. *Id.*
91. *Id.*
92. *Id.* at 444.
93. *Id.* at 443.
94. *Id.*
95. *Id.* at 444.
96. 365 F. Supp. 1308 (M.D. Fla. 1973), *rev'd on other grounds*, 496 F.2d 204 (5th Cir. 1974).
97. *Id.* at 1311. The court suggested that Insco's actions constituted a "fraud on the public," but noted that this "particular factor is not a required element of the offense prohibited by § 612." *Id.*

was applicable and required a finding that section 612 was void on its face.[98] The court observed that, unlike the broad ordinance in *Talley*, section 612 was far more limited, applying only to statements concerning candidates for specified offices.[99] The Court concluded that section 612 was limited in its coverage to requiring fairness in federal elections and "does not preclude the anonymous criticism of oppressive practices and laws referred to by the majority in *Talley*."[100]

The *Scott* and *Insco* courts distinguished section 612 from the ordinance in *Talley* on the ground that section 612 was narrower in scope. Because the *Talley* ordinance applied to all handbills, it affected the right to criticize the government and speak out on public issues, as well as the ability to comment on a particular candidate.[101] The impact of section 612 was far more limited because it was confined to statements concerning candidates for specific offices. For this reason, both courts found that it did not actually deter free speech.[102]

Like section 612, section 441d contains a narrow attribution requirement. Section 612 applied to statements concerning any person who had "publicly declared his intention to seek the office of President, Vice President, Senator, Representative in or Delegate or Resident Commissioner to Congress in a primary, general or special election or convention of a political party."[103] Section 441d similarly applies to "clearly identified" candidates.[104] Although section 612's language is more detailed,[105] the statute itself is no more limited in effect than section 441d. As a federal election law, section 441d can apply in no more situations than did section 612. Moreover, section 441d is arguably more restrictive than its predecessor, section 612. Section 441d applies only to communications "expressly advocating the election or defeat" of a candidate.[106] Section 612, on the other hand, applied to communications "concerning" a candidate, whether or not they advocated the candidate's election.[107] Because section 441d is at least as limited as

98. *Id.* at 1312.

99. *Id.*

100. *Id.*

101. The *Talley* court was most offended by this aspect of the ordinance. 362 U.S. at 64-65.

102. *See supra* notes 89, 99, 100 & accompanying text. Neither court reached the question whether the underlying governmental interests would be compelling if balanced against an actual infringement of speech. *See also infra* note 108 & accompanying text.

103. Act of August 25, 1950, ch. 784, § 2, 64 Stat. 475, 475-76 (repealed 1976).

104. 2 U.S.C. § 441d(a) (1982).

105. Section 612 specified all the federal offices for which a candidate could run.

106. 2 U.S.C. § 441d(a) (1982).

107. Act of August 25, 1950, ch. 784, § 2, 64 Stat. 475, 475-76 (repealed 1976).

section 612, its constitutionality should be upheld under the reasoning of *Scott* and *Insco*.[108]

Further indication of the constitutionality of 441d may be found in dictum contained in the Supreme Court case of *First National Bank v. Bellotti*.[109] In striking down a Massachusetts statute prohibiting corporations from making contributions or expenditures in certain referendum elections,[110] the Court suggested that a political attribution clause would be upheld. In response to the contention that voters would be unable to identify and to assess corporate expenditures, the Court stated that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."[111] The Court cited *Buckley* and *Harriss* in support of this assertion.[112] Viewed alongside the holdings in *Scott* and *Insco*, this language in *Bellotti* is a further indication that section 441d's attribution clause would be found constitutional.

The Attribution Clause: Specific Applications

Two Supreme Court decisions[113] require an analysis of whether a disclosure law is constitutional not only on its face, but also as applied to all political organizations, PACs, and individuals. In both *Buckley* and *Brown v. Socialist Workers 1974 Campaign Committee*,[114] the Supreme Court held that facially constitutional contribution disclosure laws can be unconstitutional when applied to particular minor political

108. The opinions in *Scott* and *Insco* failed to reach the question whether the governmental interests would be sufficiently compelling if the attribution requirements infringed on first amendment rights. As discussed earlier, the court in *Scott* did state, however, that the governmental interest "far outweigh[ed]" any supposed infringement. 195 F. Supp. at 444. More importantly, neither the *Scott* nor the *Insco* court expressed the slightest doubt that the federal election attribution requirements were valid. "Surreptitious publications by unknown authors are an evil which Congress has seen fit to proscribe. . . . It is a valid exercise of legislative power in the national interest." *Scott*, 195 F. Supp. at 444. The *Insco* court simply noted that "[the] statute is therefore limited in its coverage to requiring fairness in federal elections and does not preclude anonymous criticism of oppressive practices and laws referred to by the majority in *Talley*," 365 F. Supp. at 1312, thereby suggesting that compelling interests might justify an infringement of first amendment rights.

109. 435 U.S. 765 (1978).

110. *Id.* at 776.

111. *Id.* at 792 n.32.

112. *Id.*

113. Brown v. Socialist Workers 1974 Campaign Comm., 459 U.S. 87 (1982); Buckley v. Valeo, 424 U.S. 1 (1976).

114. 459 U.S. 87 (1982).

parties.[115] Therefore, even if section 441d is found facially constitutional, the constitutionality of specific applications of section 441d must be determined separately.

In *Buckley* and *Brown*, the disclosure law required political parties to divulge the identities of financial contributors. The Court found that "in certain circumstances the balance of interests requires exempting minor political parties from compelled disclosures."[116] It reasoned that the governmental interest in compelling disclosure was outweighed in the case of minor parties because the fear of reprisal might severely infringe on an individual's rights of privacy, association, and belief.[117] The fear of reprisal may be of greater concern to minor parties than to larger, well-established political parties because minor parties may have different and perhaps unpopular ideologies.[118] For this reason the Court was concerned that public disclosures might cause individuals to refrain from joining or making contributions to minor parties.

The attribution requirement in section 441d would not subject members of, or contributors to, minor parties to a comparable danger of reprisal. In contrast to the law at issue in *Buckley* and *Brown*, which required a political party to identify its contributors, section 441d only requires the identification of the person financing the communication. Under section 441d a "person" is defined as including organizations and committees.[119] Thus, section 441d requires the organization to state its name, but it does not require the organization to identify its individual members or contributors.[120] Consequently, it is unlikely that the attribution requirement of section 441d would subject individual members of a minor PAC to the danger of reprisal and thereby infringe on their freedom of association. The attribution requirement of section 441d should be found constitutional as applied to all political organizations.

The Authorization Clause

Although the attribution requirement of section 441d should sur-

115. *Id.* at 92-93 (Ohio statute held unconstitutional as applied to the Socialist Workers Party); *Buckley*, 424 U.S. 1, 74 (1976).

116. *Brown*, 459 U.S. at 92 (citing *Buckley*, 424 U.S. at 70).

117. *Brown*, 459 U.S. at 93; *Buckley*, 424 U.S. at 64.

118. *Brown*, 459 U.S. at 93; *Buckley*, 424 U.S. at 71. Minor parties "are less likely to have a sound financial base and are more vulnerable to falloffs in contributions." *Brown*, 459 U.S. at 93 (quoting *Buckley*, 424 U.S. at 71). If the falloffs were severe, the minor parties could not survive. *Id.*

119. 2 U.S.C. § 431(11) (1982).

120. *See* 2 U.S.C. § 441d(a) (1982).

vive constitutional attack, the authorization clause presents a more difficult question because no federal court has ruled on the constitutionality of such a requirement. The authorization clause of section 441d, as amended in 1980, requires that all communications advocating the election or defeat of a candidate that are not paid for by the candidate state whether they have been authorized by the candidate.[121] Because the statute compels individuals and groups to make statements, the constitutionality of this requirement is at issue.[122]

Although the Second Circuit declined to determine the constitutional validity of section 441d in *Federal Election Commission v. Central Long Island Tax Reform*,[123] two concurring justices expressed doubt concerning the constitutionality of such compelled speech.[124] An examination of their argument reveals its weakness. The two concurring justices argued that the first amendment presupposes that free speech without government regulation is the best method of informing the electorate.[125] For this reason, they argued, the courts have consistently struck down all "government regulation of speech designed to make information available to the public."[126] They implied that promoting the availability of information could never justify a disclosure of authorization requirement.[127]

In support of this argument, the justices cited *Talley*[128] and *Miami Herald Publishing Co. v. Tornillo*.[129] These cases, however, are inapposite. As previously discussed, the *Talley* ordinance was found unconstitutional not because it required disclosure, but because it was overly broad.[130] The court never considered whether the public's interest in information could justify a disclosure requirement where the statute was more narrowly tailored.

Nor does *Miami Herald* stand for the proposition that regulating speech to make information available to the public is invalid in all cir-

121. *See* 2 U.S.C. §§ 441d(a)(2), (3) (1982).

122. The first amendment protects "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

123. 616 F.2d 45 (2d. Cir. 1980).

124. *Central Long Island*, 616 F.2d 45, 54 (2d Cir. 1980) (Kaufman, C.J., concurring). In addition to § 441d, 2 U.S.C. § 434(e) was also at issue. This statute required political committees other than principal committees to file a statement of organization with the FEC. 616 F.2d at 47 n.1.

125. *Id.* at 54.

126. *Id.*

127. *Id.*

128. 362 U.S. 60 (1960).

129. 418 U.S. 241 (1974).

130. *See supra* notes 73-78 & accompanying text.

cumstances. *Miami Herald* involved a state statute that required newspapers to publish the replies of candidates whom they had criticized in order to give the public another side of the controversy. The Supreme Court reluctantly held the right of reply statute to be an unconstitutional infringement on freedom of the press.[131] The Court based its decision on the ground that the regulation compelled the newspaper to publish material which in its own good judgment it had decided not to publish,[132] thus abridging the press' editorial discretion and first amendment rights.

The *Miami Herald* holding, however, does not encompass all statutes regulating or compelling speech without limitation.[133] Previously, in *Red Lion Broadcasting Co. v. FCC*,[134] the Supreme Court upheld the validity of a right of reply statute that applied to television and radio broadcasts.[135] The Court concluded in *Red Lion* that the broadcaster's interest in exercising editorial discretion was outweighed by the public's interest in the free flow of information.[136] *Red Lion* demonstrates that regulations on speech aimed at making information available to the public can be and have been held constitutional, thus refuting the argument of the concurring justices in *Central Long Island Tax Reform.*

In summary, the arguments advanced against the constitutionality of section 441d's authorization clause are defective. Attribution clauses pose a constitutional question because the danger of reprisal from individuals who dislike the statements may deter individuals or groups from exercising their constitutional rights of expression and association.[137] The authorization clause of section 441d does not produce such dangers. The authorization clause requires only that a communication state whether it is authorized by any candidate, and does not require the identification of the maker of the statement. Therefore, a disgruntled individual would not know whom to harass or to threaten. Identification, not authorization, is the element that creates the danger of reprisal. For this reason, the rationale underlying *Talley* is inapplicable to authorization clauses.

A first amendment violation might occur if an individual refrains

131. *Miami Herald*, 418 U.S. 241, 256 (1974).

132. *Id.*

133. Barrow, *The Fairness Doctrine: A Double Standard For Electronic and Print Media*, 26 HASTINGS L.J. 659 (1975). "The Supreme Court has adopted a double standard in application of the fairness doctrine to broadcasting and print media." *Id.*

134. 395 U.S. 367 (1969).

135. *Id.* at 400-01.

136. *Id.* at 390.

137. *See supra* notes 76, 86-95 & accompanying text.

from making the statement because she fears the disclosure that a communication is unauthorized will diminish the degree of credibility attributed to the communication. The courts are unlikely to view this as a serious infringement of speech, however, in light of numerous holdings that the source of a statement is an important consideration in the voters' assessment of a statement's value.[138]

Section 441d's authorization clause does not infringe upon an individual's freedom of speech or association. The statute compels only a factual statement that will not deter individuals from airing their political views. The authorization clause, like the attribution clause, does not violate the first amendment.

Recommendations

The existence of an informed electorate is essential to the success of democracy.[139] To promote a marketplace of ideas so that reasoned decisions could be made, the framers of the Constitution sought through the first amendment to ensure the free circulation of ideas by protecting the freedoms of the press and of speech.[140]

Congress has enacted a variety of laws compelling individuals and groups to disclose certain information that enables voters and representatives to assess conflicting viewpoints and arguments and to make informed decisions. In sharp contrast, injurious PAC support thrives on misperception, misinformation, and an uninformed electorate. The harm arises when voters mistakenly believe that a candidate is wholly or partially responsible for the acts of supportive political organizations and individuals. If the misperception is eliminated, so too is the danger of injurious PAC support.

Section 441d helps to inform the electorate and eliminate this misperception. Through its authorization and attribution disclosure requirements, section 441d exposes the actual relationship between the candidate and supportive individuals and organizations. In so doing, section 441d not only helps to protect candidates from the harm of in-

138. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 792 n.32 (1978); Buckley v. Valeo, 424 U.S. 1, 66-67 (1976); United States v. Scott, 195 F. Supp. 440, 443 (D. N.D. 1961); *see also* United States v. Harriss, 347 U.S. 612, 625 (1954) (upholding statute requiring disclosure of information from lobbyists because such information was deemed necessary for elected representatives to evaluate properly the political pressures they are subjected to).

139. Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976); Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 928 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

140. Abrams v. United States, 250 U.S. 616, 630 (1919). *See* Whitney v. California, 274 U.S. 357, 375-76 (1927).

jurious PAC support, but also allows voters to assess accurately the relationships between candidates and their supporters.

Given the important state interests that section 441d protects, the infrequency of proven cases of decisively injurious PAC support is no justification for laxity in eliminating potentially misleading political statements. The only logical reason for opposing stringent attribution and authorization requirements is that such requirements deter individuals from making political statements, because they fear that the identification of a communication's source might diminish the communication's effectiveness. This concern is entitled to little weight because it is based on the premise that truthful disclosure should be limited in order to preserve an individual's ability to confuse, mislead, or deceive voters.

For the above reasons, section 441d is a welcome device for promoting an informed electorate. Congress should strengthen the existing requirements of section 441d to further this important aim. An excellent starting point would be the reenactment of the "clear and conspicuous" requirement contained in the 1976 version of the statute.[141] The attribution and authorization statements presently appear at the end of the communication, often in small print. A requirement that the information be displayed prominently in print media, or orally in the case of television broadcast communications, would greatly increase public awareness of the relationship between a candidate and political communications.

Congress should further require the inclusion of a brief explanatory statement such as: "A Political Action Committee's legal right to expend amounts in excess of $5,000 per candidate is dependent upon the committee's total independence from the control or influence of any candidate." This statement would help to clarify the little understood and highly complex relationship between contributions, expenditures, PACs, and candidates brought about by the *Buckley* decision. Enactment of these proposals might diminish the confusion, misrepresentation, and skepticism incident to political campaigns.

Conclusion

Injurious PAC support is a serious problem involving one of democracy's most basic concerns—the maintenance of an informed electorate. Injurious PAC support only arises when voters mistakenly blame the candidate for the actions of a supportive, but independent,

141. 2 U.S.C. § 441d(2) (1976) (amended 1980).

PAC. By requiring attribution and authorization disclosures, section 441d helps protect the candidate by diminishing misperceptions about the candidate's responsibility for a particular communication. More extensive disclosure requirements should minimize the danger of injurious PAC support. In a broader sense, section 441d strengthens the American democratic process by compelling the disclosure of information voters need to assess accurately the relationship between a candidate and a PAC, thus contributing to a more perfectly informed electorate.

*Mitchell L. Gaynor**

* Member, Third Year Class.